

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

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Federal-State Joint Board on

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Universal Service

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CC Docket No. 96-45

**REPLY COMMENTS OF
MINNESOTA INDEPENDENT COALITION**

June 3, 2003

SUMMARY

The Minnesota Independent Coalition supports the Initial Comments of the National Telephone Cooperative Association (“NTCA”) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”).

As the NTCA and OPASTCO Initial Comments show, the costs of the federal universal service fund will quickly rise to unsustainable levels: (i) if promotion of competition continues to dominate public interest determinations by both the Commission and the States; and (ii) if the payment of support to competitive eligible telecommunications carriers (“CETCs”) continues to be based on the per line costs of rural, Incumbent ETCs. To prevent that result, the Joint Board and Commission should act promptly to return the public interest determination under Section 214(e)(2) and (6) to core universal service goals and to replace the current portability mechanism which provides federal universal support payments to CETCs based on the costs of the Incumbent ETCs.

The public interest determination should be based on a thorough cost-benefit analysis that is consistent and compares the possible *increase* in competition and customer choice *for the proposed service area* to the added costs of providing universal service *for the same area*.

CETCs should not receive support based on the costs of rural, Incumbent ETCs because rural Incumbent ETCs perform the critical obligations of carriers of last resort (“COLRs”) on which achievement of universal service goals is based. As a direct result, their per line costs reflect the costs of performing COLR obligations, typically in the highest cost parts of their respective states. Since CETCs do not perform comparable obligations (or incur comparable costs), their support should not be based on those higher ILEC costs. Further, providing identical support to CETCs who do not incur the same costs or perform the same obligations is not

competitively neutral. In addition, it would be inappropriate to impose “caps” on the levels of universal service received by Incumbent ETCs or to limit support to primary lines, particularly for Incumbent ETCs that perform COLR obligations.

The Joint Board and Commission should dismiss from further consideration the use of either the costs of the lowest cost provider or an auction process for selection of ETCs because both approaches provide powerful incentives to minimize investments and reduce service quality. Minimization of investments and reduction in service quality are both contrary to the core goals and priorities of universal service.

Finally, States that have designated additional CETCs have followed the Commission’s emphasis on the promotion of competition, and should not be penalized for doing so. If the Commission considers imposing the costs of designating additional CETCs on the individual States making those designations, that policy should be applied on a prospective basis only.

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The Minnesota Independent Coalition (“MIC”) respectfully submits the following Reply Comments. The members of the MIC are all “rural telephone companies”¹ providing local exchange service in the State of Minnesota. The MIC supports the Initial Comments of the NTCA and OPASTCO.² The Joint Board and Commission should act promptly to return the public interest determination under Section 214(e)(2) and (6) to core universal service goals and to replace the current portability mechanism that provides universal service support to CETCs based on the Incumbent ETC’s costs. Paying CETCs based on the costs of rural Incumbent ETCs who are Carriers of Last Resort (“COLRs”) is not competitively neutral because CETCs do not perform those obligations. Both auctions and universal service payments based on the lowest cost provider violate universal service principles and should be rejected. Finally, the Commission should not impose added costs on States that have certified CETCs using criteria that the Commission has adopted and applied.

¹ 47 U.S.C. § 153(37).

² National Telecommunications Cooperative Association Initial Comments, May 5, 2003 (“NTCA Comments”); Comments of Organization For The Promotion And Advancement Of Small Telecommunications Companies, May 5, 2003 (“OPASTCO Comments”)

I. UNIVERSAL SERVICE COSTS WILL QUICKLY RISE TO UNSUSTAINABLE LEVELS UNDER THE CURRENT APPROACH TO THE PUBLIC INTEREST DETERMINATION AND THE CURRENT PORTABILITY MECHANISM.

OPASTCO and NTCA are correct when they predict that the cost of the universal service program will quickly increase to unsustainable levels if the current overemphasis on the benefits of competition and the current portability rules continue to be applied. The Joint Board and Commission should return the public interest determination under Section 214(e)(2) and (6) to core universal service principles and revise the portability mechanism that currently bases support for CETCs in the costs of Incumbent ETCs.

A. The Costs Of Universal Service Are Increasing Exponentially As Multiple ETC Applications Are Filed And Approved Under Current Criteria.

The OPASTCO and NTCA Comments note the dramatic increases in the levels of universal service funding provided to CETCs³ and predict that designation of multiple CMRS providers for the same areas will become commonplace, if it is not so already.⁴ Developments that are pending at the State level and which are not fully included in USAC data suggest that there may be exponential increases in funding to CETCs in the near future if current practices continue.

Applications by multiple CETCs for the same areas are occurring in several States. In addition to the examples cited by OPASTCO and NTCA, large parts of Minnesota now have multiple CETCs that are either already designated as CETCs or are pending.⁵ Overlap includes

³ NTCA Comments at p. 10; OPASTCO Comments at p. 9.

⁴ NTCA Comments at pp. 9-10; OPASTCO Comments at p. 10.

⁵ Western Wireless has been designated as a CETC and Midwest Wireless has received conditional designation. See, Order Granting Preliminary Approval and Requiring Further Filings, Docket No. P-5695/M-98-1285, October 27, 1999, and Order Granting Preliminary Approval and Requiring Further Filings, Docket No. PT-6153/AM-02-686, March 19, 2003; Applications for ETC status are pending for

or is likely to include: (i) Western Wireless, Midwest Wireless, and Nextel all designated as CETCs for some of the same areas; (ii) Western Wireless, RCC, and Nextel all designated as CETCs for some other areas; (iii) Western Wireless, Wireless Alliance, and Nextel all designated as CETCs for some other areas; and (iv) Midwest Wireless, Nextel, and Southern Minnesota Wireless all designated as CETCs for other areas. In Wisconsin, the Wisconsin PSC's decision to designate US Cellular as a CETC was followed by applications for CETC designation by 7 other CMRS providers even before the Wisconsin PSC decision was issued as a written order.⁶

Thus, the prediction of designation of virtually all rural CMRS providers, which underlies the prediction of a \$2 Billion increase in the cost of high-cost support, is already far along the way to fulfillment. That prediction cannot be disregarded, and it refutes that assertion by some CMRS providers that no remedial action is needed at the present time.⁷

B. The Joint Board and Commission Should Move Promptly To Return The Public Interest Determination To Core Universal Service Values And To Change The Current Practice Of Paying CETCs Based On Rural, Incumbent ETC Costs.

As OPASTCO and NTCA have argued, the Commission should move promptly to return the public interest criteria to the core universal service values.⁸ A prompt resolution is needed because of the pace and scope of increases to the cost of the high-cost fund. Promotion of competition was not among the principles listed by Congress in Section 254(b), and it is clear

Nextel and Minnesota Southern Wireless. See, MPUC Dockets PT-6200/M-03-647 and P-6213/M-03-591, respectively.

⁶ Those seven wireless companies are:

Wausau Cellular, filed 11-25-02 (Docket 8250-TI-100)
Metro Southwest, filed 11-25-02 (Docket 8123-TI-100)
Brown County MSA Cellular Ltd Partnership, filed 11-25-02 (Docket 8159-TI-100)
Wisconsin RSA #3 Ltd Partnership, filed 11-25-02 (Docket 8194-TI-101)
Wisconsin RSA #4 Ltd Partnership, filed 11-25-02 (Docket 8195-TI-101)
Wisconsin RSA #10 Ltd Partnership, filed 11-25-02 (Docket 8201-TI-101)
NSighttel Wireless LLC, filed 12-4-02 (Docket 8202-TI-101)

⁷ Comments of United States Cellular Corporation, May 5, 2003.

that Congress must have considered promotion of competition as a possible universal service principle and would have included promotion of competition as an express universal service principle had Congress intended that result.

Instead, the Commission added “competitive neutrality” as a universal service principle, using its authority under Section 254(b)(7).⁹ At the time that decision was made, it was impossible to estimate the added cost of using universal service in this manner, much less the cost of making promotion of competition the predominant factor in making the public interest determination by States under Section 214(e)(2) and by the Commission under Section 214(e)(6). The dramatic change in circumstances justifies reconsideration of these issues, and the pace and scale of cost additions justifies doing so expeditiously.

As NTCA notes: “There is no point in waiting for the train wreck.”¹⁰ These problems must be addressed now.

II. THE JOINT BOARD AND COMMISSION SHOULD PRESCRIBE A COST-BENEFIT ANALYSIS THAT COMPARES ANY ADDED BENEFITS FOR A PROPOSED SERVICE AREA TO THE ADDED COSTS OF PROVIDING UNIVERSAL SERVICE FOR THE SAME AREA.

OPASTCO and NTCA are correct that a thorough cost-benefit analysis should be performed as part of a public interest determination under Section 214(e)(2) and (6).¹¹ However, the Commission should also take further steps to assure that the analysis is based on premises that are consistent for both costs and benefits. Specifically, the analysis must focus *on any additional* competition or customer choices that may occur as a result of designating a CETC,

⁸ NTCA Comments at pp. 19-28; OPASTCO Comments pp. 39-51.

⁹ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd. 8776, ¶¶ 46-50 (1997) (“*First Report and Order*”).

¹⁰ NTCA Comments at p. 14.

¹¹ NTCA Comments at pp. 19-28; OPASTCO Comments at p. 41.

because any existing competition or customer choices and any additional competition and customer choices that would occur *without* universal service support cannot logically be attributed to providing CETC designation. In addition, the Joint Board and Commission should provide guidance so that both the cost and benefit sides of the analysis focus on the same area.

The Joint Board and Commission should specify key parameters for making the cost-benefit analysis. Specifically, the Joint Board and Commission should specify that the States should consider: (i) the level of any anticipated *increase* in competition or customer choice that is likely to result from the designation of an additional CETC, taking into account both the level of competition and choice already available and the level of increase that would be likely to occur *without* universal service support; and (ii) the percentage of increase in the cost of providing universal service support to the proposed service area, taking into account the current cost of providing universal service support *to that same area*.

The competition and customer choice that is relevant to the decision whether to designate an additional CETC cannot be based on the assumption that there will be no competition without designation or on the abstract policy goals of competition and customer choice. Rather, the relevant consideration is what *change* in competition or customer choice, if any, will occur as a result of designation of an additional CETC.

While such an analysis may be difficult to conduct with precision, at least the analysis should start out focused on the right question. In the alternative, decisions are made that are little more than endorsements of competition as an abstract principle.

In addition, the Commission should direct the States to consider the impact on the total costs of the providing universal service *in the proposed service area*. For example, if the costs of providing universal service will increase by 40% as a result of the funds that will be received

by the specific CETC, the States should be directed to consider whether there is a proportionate (e.g. 40%) increase in competition or customer choice or some other benefit that would justify such a significant percentage increase in costs. The States should also be directed to consider the impact of designation other similarly situated potential CETCs, since it is clear that multiple applications for designation as CETCs must be anticipated.

The States have applied the priorities established by the Commission and there is no reason to anticipate that the States will not respond appropriately to modifications directed by the Commission.

III. CETCS SHOULD NOT RECEIVE SUPPORT BASED ON THE COSTS OF RURAL, INCUMBENT ETCs THAT PERFORM COLR OBLIGATIONS AND THUS INCUR HIGHER COSTS THAN CETCS THAT ARE NOT COLRs.

As OPASTCO and NTCA note, CETCs and Incumbent ETCs are not similarly situated. There are a number of distinctions, but the key distinction from a universal service perspective is that Incumbent ETCs perform the COLR obligations, which provide the foundation without which it would be impossible to achieve universal service goals.

A. The COLR Obligations Performed By Rural Incumbent ETCs Are The Foundation Of Universal Service Goals.

OPASTCO and NTCA both note that Incumbent ETCs perform COLR obligations that are not imposed on CETCs.¹² However, if anything, OPASTCO and NTCA understate the significance of those obligations to the questions before the Joint Board and Commission.

Performance of COLR obligations provides the foundation without which universal service could not be achieved. The obligations of most Incumbent ETCs to provide service to all customers is so pervasive and long standing that it is largely overlooked. Nonetheless, it is the

¹² NTCA Comments at p. 26; OPASTCO Comments at p. 45.

foundation on which universal service rests. Although COLR obligations for local service providers arise and are enforced primarily under the various State laws, the dependence of universal service goals on the COLR obligations is not diminished by the fact that these obligations arise primarily under State law, and the achievement of universal service goals requires participation by both the States and the Commission.

The Commission's rules do not require that a CETC become a COLR and the Commission rejected arguments that CETCs be required to do so.¹³ However, there is a clear distinction between: (i) requiring an ETC to perform such obligations, which the Commission has not done; and (ii) recognizing that the performance of such obligations adds costs which are not incurred by CETCs that do not do so. The Commission should take this opportunity to acknowledge the significance of the COLR role both to achievement of universal service goals and to the costs of providing service.

B. Providing Support To CETCs That Do Not Perform COLR Obligations Based On The Costs of Being A COLR Is Not Competitively Neutral.

OPASTCO and NTCA have correctly noted that providing universal service support to CETCs that do not perform COLR obligations based on the Incumbent ETC's costs of performing those obligations is not competitively neutral.¹⁴ Providing identical support to entities that are not in a comparable position will either under-compensate one of the entities or over-compensate the other. In this case, providing support to CETCs based on the COLR-related costs of the Incumbent ETCs over-compensates CETCs.

CETCs, including CMRS providers, have the right to limit investments to only those investments that fit their business-case criteria. As a result, it is hardly surprising that the

¹³ *First Report and Order* at ¶ 142.

average per line costs of Incumbent ETCs that perform COLR functions is higher than carriers that do not, and the higher per line costs do not reflect any lack of efficiency.

Arguments have been made that competitive neutrality does not require that identical state regulations be imposed upon CETCs. However, those arguments are all the more applicable to universal service payment levels. Competitive neutrality does not require that CETCs be paid the costs of performing obligations (COLR) that they do not perform. To the extent that CMRS providers are not required to perform COLR obligations, payments based on the costs of performing those obligations amount to a windfall for the CETCs. For rural Incumbent ETCs, those costs undoubtedly have a significant effect on the Incumbent ETC's costs. Accordingly, the Joint Board and Commission should change the practice of paying CETCs in rural ETC areas based on the costs of the rural Incumbent ETCs. Instead, CETCs should receive universal service support at a level that is reduced to reflect the fact that they do not perform COLR obligations.

C. Imposing Caps On Universal Service Support Or Limiting Support To Primary Lines For Incumbent ETCs Who Perform COLR Obligations Would Conflict With The Goals Of Universal Service.

As OPASTCO recommends, the Joint Board and Commission should not impose artificial caps on the levels of support provided to the Incumbent ETCs.¹⁴ Such caps would be completely inappropriate so long as the Incumbent ETCs continue to perform the COLR obligations on which achievement of universal service goals rests. Similarly, it would be inappropriate to limit support to primary lines. Imposing caps or limiting support to primary lines would discourage investment, particularly for the highest cost customers. Introducing such

¹⁴ NTCA Comments at pp. 12-14; OPASTCO Comments at pp. 11-18.

¹⁵ OPASTCO Comments at pp. 22-23.

an incentive is fundamentally inconsistent with the universal service principle of providing affordable, high quality service to every customer. It seems apparent that providing *at least one* high quality affordable alternative to every customer must take priority over providing universal service support to multiple, alternative providers many of whom are already available without receiving funding. To the extent that providing universal service support to multiple alternative providers interferes or prevents providing at least one affordable high quality alternative to everyone, providing universal service support to multiple providers must yield priority.

At the point where decisions are needed to limit the size of the universal service fund, it is necessary to select between priorities. Since imposing caps or limiting support to primary lines would interfere with all customers having at least one high quality, affordable alternative, those mechanisms for limiting the size of the fund must be rejected in favor of finding other ways to limit the size of the fund.

IV. THE JOINT BOARD AND COMMISSION SHOULD REJECT THE USE OF EITHER THE COSTS OF THE LOWEST COST PROVIDER OR AUCTIONS.

Using either the lowest cost provider to establish universal service support levels or an auction process to award universal service support would be fundamentally inconsistent with the core goals of providing high quality service at affordable rates. Accordingly, those approaches should be rejected.

A. Basing Universal Support Levels On The Costs Of The Lowest Cost Provider Would Provide Powerful Incentives To Minimize Investments That Conflict With Core Universal Service Goals.

OPASTCO's Comments clearly show why universal service funding should not be based on the lowest cost provider's costs. OPASTCO points out that Incumbent ETCs and CETCs are "not at all similarly situated," citing service quality standards that are imposed by many states on

Incumbent ETCs,¹⁶ the ability of CETCs to areas smaller than a study area,¹⁷ and the ability to use resale of Incumbent ETC facilities to serve higher cost areas.¹⁸ If anything, these factors understate the differences between CETCs and their costs and Incumbent ETCs and their (higher) costs.

The critical factor in determination of an Incumbent ETCs costs is the obligation of virtually all Incumbent ETCs to provide service as a COLR. These obligations arise under state law, but that fact does nothing to diminish the added costs that result. Accordingly, it is highly predictable that the costs of CETCs without COLR obligations would be lower than the costs of a rural, Incumbent ETC in the same area. It is equally predictable, however, that providing support at the level of the lower cost CETC would not be sufficient to allow Incumbent ETCs to continue to provide high quality services at affordable rates or to perform the obligations of a COLR.

Instead, the incentive would be to minimize investments and costs. Such incentives are directly at odds with the core universal service goals of providing high quality service, including access to advanced services, at affordable rates.

B. Basing Universal Service Support On Auctions Would Also Provide Powerful Incentives To Minimize Investments That Conflict With Core Universal Service Goals.

OPASTCO is also correct in its assessment that auctions are a “race to the bottom,”¹⁹ and NTCA is correct when it states that “the winning bidder could be the carrier which intends to commit the least amount of resources to the area.”²⁰

¹⁶ OPASTCO Comments at 27.

¹⁷ Id.

¹⁸ Id. at 28.

¹⁹ OPASTCO Comments at 29.

Once an auction was won, the clear incentives for the winning bidder would be to maximize the return while minimizing the costs, including investments. Attempting to prevent the adverse effects of such incentives would inevitably center on enforcement of rules that would set forth the *minimum standards* that are acceptable. As a result, the incentives that would necessarily result from an auction would systematically reduce the quality of service to the minimum acceptable levels, which violates the goals of universal service. This unfortunate result would be compounded by the difficulty of articulating, much less enforcing, rules designed to provide high quality with a service as complex as telecommunications. Accordingly, auctions should be rejected as a possible mechanism to control universal service costs.

V. THE STATES THAT HAVE DESIGNATED ADDITIONAL ETCS HAVE RELIED ON THE COMMISSION’S FOCUS ON PROMOTING COMPETITION AND SHOULD NOT BE PENALIZED FOR DOING SO.

USTA has urged the Commission to require States that designate additional CETCs to bear “some of “ the added costs that result in an effort to assure thoughtful implementation of the public interest standard of Section 214(e)(2).²¹ That suggestion presumably means that the States which designate additional CETCs should bear a greater portion of the added costs than would otherwise occur as a result of the nationwide funding mechanisms for universal service. Whatever the merits of that approach on a prospective basis, it would be completely inappropriate to apply that approach retroactively because the *Commission’s decisions* established the overwhelming focus on promotion of competition and the States have relied on the Commission’s decisions in making their public interest determinations.

²⁰ NTCA Comments at 18.

²¹ USTA Comments at 15.

A. The Commission's Prior Decisions Indicated That Promotion Of Competition Was Of Greater Importance Than Other Public Interest Factors.

The Commission's prior decisions regarding designation of additional ETCs have focused heavily on the promotion of competition as the key factor in designating additional ETCs and have indicated that the increased costs resulting from designation of an additional CETC should not be considered.

The Commission's decisions regarding the designation of additional CETCs have focused heavily on the promotion of competition in application of the public interest test.²² Further, the Commission has indicated that the added costs of designating an individual CETC should not be considered in deciding whether to designate a particular CETC. In declining to consider added costs as a part of the public interest analysis for designation of an additional ETC in areas served by rural telephone companies, the Wireline Competition Bureau recently stated that:

We recognize that these parties raise important issues regarding universal service high-cost support [including added costs]. We find, however, that these concerns are beyond the scope of this Order, which designates a particular carrier as an ETC.²³

Accordingly, it is clear that the practice of ignoring added costs of designating additional ETCs was actively applied by the Commission and was not originated by the States. It would be unreasonable to penalize that States for applying the same approach used by the Commission.

²² Cellular South License, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, MEMORANDUM OPINION AND ORDER, CC Docket No. 96-45, DA 02-3317, ¶ 25, December 4, 2002; RCC Holdings, Inc. Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, MEMORANDUM OPINION AND ORDER, CC Docket No. 96-45, DA 02-3181, ¶ 23, November 27, 2002

²³ Cellular South License, Inc. at ¶ 32; RCC Holdings, Inc. at ¶ 32.

B. The States Have Relied On The Commission's Focus On Promotion Of Competition When Designating Additional CETCs.

Penalizing the States for not considering costs would be particularly unjust since it is clear that the States have relied on the Commission's decisions both in focusing on competition and ignoring added costs of designating an individual CETC.

For example, the Minnesota PUC has relied explicitly on the Commission's emphasis on the promotion of competition and alternatives for customers as key factors in the public interest test.²⁴ The Minnesota PUC also relied directly on the Wireless Competition Bureau's recent decisions to not consider the added costs of designation of individual ETCs in dismissing arguments that the cost of the federal universal service program would increase upon such a designation, saying in part:

[T]he FCC has concluded that the financial impact on the federal fund of designating a carrier as an ETC is irrelevant to whether a carrier should be so designated.²⁵

While the MIC strongly disagrees with the Minnesota PUC's approach, it is clear that the Minnesota PUC relied heavily on the direction established by the Wireless Competition Bureau's recent decisions. Given this direction, it would be particularly unreasonable to apply a policy of imposing such costs directly on a State for making such a designation by changing the rules *after* a designation was made. To the extent that the Commission would consider such an approach, it should be done *only on a prospective basis*.

²⁴ *Petition of Midwest Wireless LLC for Designation as an ETC*, ORDER GRANTING CONDITIONAL APPROVAL AND REQUIRING FURTHER FILINGS, MPUC Docket No. PT-6153/AM-02-686 (March 19, 2003) at p. 7-8 (Citing the Wireless Competition Bureau's MEMORANDUM OPINION AND ORDER in the *Petition of RCC Holdings*.)

²⁵ *Id.* at p 11.

CONCLUSION

For the reasons set forth above, the Joint Board and Commission should:

1. Act promptly to return the public interest test to core universal service values;
2. Replace the current practice of paying CETCs on the basis of Incumbent ETC costs;
3. Dismiss the suggestions that artificial caps be imposed on universal service support for ETCs that perform COLR obligations or that support be limited to primary lines;
4. Reject suggestions that universal service support be based on either auctions or the costs of the lowest cost provider; and
5. Reject suggestions to impose additional costs on States that have done nothing more than apply the Commission's public interest criteria in designating additional ETCs.

Respectfully submitted,

MINNESOTA INDEPENDENT COALITION



By Richard J. Johnson, Its Attorney